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No. 81-2306

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
Petitioner,
v.
BOSTON SCHOOL COMMITTEE, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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1. Respondents Boston School Committee and Superintendent of Boston Public Schools (hereinafter referred to collectively as "the Boston school authorities") assert that the district court's unappealed order of July 5, 1978, empowered the Boston school authorities to achieve the required proportions of black teachers within the school system by means of laying off senior white teachers while retaining junior black teachers. Boston School Opp. at 5. Proceeding from that premise, these respondents maintain that the clause in the 1980 collective agreement making the agreement "subject to all applicable State and Federal laws and lawful Orders pursuant thereto" had the effect of subordinating the provisions of that agreement requiring that layoffs be made on the basis of seniority to the power of the school authorities under the 1978 order to make layoffs on a racial quota basis. Boston School

Opp. at 5-6. And, on that same premise, these respondents contend also that the district court's June 2, 1981 order, which is the subject of the present litigation, is no more than a "technical modification" of the 1978 order—indeed, a modification that *ameliorates* the effects upon whites of the 1978 order—and thus somehow is unworthy of being addressed on its merits as the court below did. Boston School Opp. at 6.

These contentions of the Boston school authorities fail at the threshold: the 1978 order did not empower the school authorities to achieve the required racial proportions through the use of layoffs based on racial quotas. The 1978 order—which is captioned "Memorandum And Further Orders On Faculty *Recruting And Hiring*" (emphasis supplied)—confers a power to adopt additional steps only with respect to "*recruiting* and *hiring* procedures":

> If recruiting and hiring procedures in addition to those heretofore and herein ordered by the court should become necessary in order to achieve said annual increase, the city defendants shall select and adopt them, without further court order, ...[July 5, 1978 Order at 4.] [1]

In a footnote attached to the above-quoted sentence, there is, as the Boston school authorities now stress, a reference to "modifying the excessing policy" in the context of a list of "examples" of possible additional recruiting and hiring procedures. But at most that reference is ambiguous. And, the decisive point is that *no*

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[1] See also the earlier portion of the 1978 order, stating:

> The mandatory annual 1½% increase in the percentage of black teachers in the school system as a whole is a minimum which, on the basis of abundant evidence at the hearings of past and predictable vacancies in teaching positions and taking declining student enrollments into account, we find to be *readily attainable during the next several years without impairing the job security of teachers who are tenured or may be permanently appointed.* [*Id.* at 2, emphasis supplied.]

party to this case understood that reference in the 1978 order as conferring upon the school authorities the power to achieve the required proportions of black teachers by making layoffs based on race. Precisely because the Boston school authorities did not understand the 1978 order to confer such a power, those authorities in February, 1981, faced with the prospect of significant reductions in the teacher-force, stated that "the guidance of the Court is urgently needed," and requested the district court to resolve the conflict between the layoff-seniority provisions of the collective agreement and the requirement of the court's previous orders that blacks comprise a certain proportion of the teacher-force. Thus, in a memorandum to the court filed on February 19, 1981, the Boston school authorities stated:

> The School Department is subject to conflicting obligations insofar as it is simultaneously bound to the collective bargaining agreements and committed, both legally and morally, to the successful desegregation of its teaching and administrative workforces. Only the Court can ultimately resolve this conflict.
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> • • • •
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> The one generalization that can be made about the Court's faculty and administrative desegregation orders is that they contemplate desegregation by means of hiring.
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> • • • •
>
> The School Department might simply try to adhere to outstanding orders as best it can under the circumstances.[3] However, since the current crisis

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[3] Since the teacher desegregation orders focus primarily on *results*—increases in percentages—presumably it [sic] would apply regardless of whether the teaching force is expanding or contracting. *However, those orders do not explicitly authorize departures from the seniority provisions of the collective bargaining agreements, and, as was noted earlier, those orders assume that they will not interfere with the job security of permanent teachers.*

> presents a situation quite different from the one which existed when those orders were entered, the School Defendants believe that those orders should at least be reexamined. Moreover, to the extent that those orders mandate specific increases in the percentages of minorities in any category of employees come what may, the current situation makes compliance with those orders an extremely unlikely prospect. Reexamination of those orders becomes a virtual necessity. [School Defendant's Preliminary Memorandum Regarding Reductions In Force, at 3, 4, 5, emphasis added.]

Thus, the Boston school authorities' contentions in this Court are belied by their own submissions to the district court. (For an accurate statement of the events leading to the 1981 order see the opinion below, App. A-4.)[2]

2. Like the Boston school authorities, the basic approach of the respondents Tallulah Morgan, et al. (the plaintiffs below) is to treat this case as one controlled by the lower court's *hiring* orders, thereby evading the basic question whether a racial hiring quota is the constitutional equivalent of a racial layoff quota. The plaintiffs below do deviate from this approach in one significant respect—they seek to justify the racial layoff quota on the basis of the "role model" theory. Morgan, et al. Opp. at 9-10, n.5. But as detailed at pp. 13-14 of the petition, that theory had been expressly *discredited* in the dis-

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[2] The Boston school authorities advisedly ignore the unfairness of an order that allows the school authorities—the defendants who were found to have violated the Constitution—to make substantial financial savings at the expense of the terminated white teachers. To justify this result, respondent Concerned Black Educators charge the teachers with "tacit approval" of the school authorities discriminatory hiring practices. Educators' Opp. at 3, 11. No evidence is cited as support for this charge and the concept of guilt by "tacit approval" is foreign to the law. Cf. *General Building Contractors Association v. Pennsylvania*, —— U.S. ——, 50 L.W. 4975, 4979-4982 (June 29, 1982).

trict court's original decision. The position of the plaintiffs below *then* was that black school children were disadvantaged by the assignment of relatively inexperienced black teachers to primarily black schools. That position, which the district court accepted, was then, and in our view remains, correct. The felt necessity to contradict their prior position[8] in order to defend the layoff quota order presently on review demonstrates that the layoff order is not, as the plaintiffs below proclaim, a mere extension of the hiring order, but is actually inconsistent therewith *in its effect on Boston school children*, black and white. The failure of the courts below to recognize this inconsistency impeaches their conclusion that the racial layoff quota decreed is equitable—even if as those courts assumed the adversely affected teachers' interests could be disregarded. Plaintiffs argument that "[t]he effect of making layoffs proportionate to the prevailing racial/ethnic percentage within the school system is to equalize the burden of layoffs among the races" (Morgan et al. Opp. at 12) is bad mathematics, worse equity, and we believe, unsound constitutional law.

3. In our petition, we stated that as a result of the district court's order here in question, "over a thousand white teachers with tenure of up to 16 years of service have been laid off while none of the tenured black teachers (including those with lesser service) have been laid off and at the same time new black applicants have been hired." Pet. at 8-9. None of the respondents challenges that statement, which is accurate in every respect. But

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[8] See, e.g., *Scarano v. Central R .Co. of New Jersey*, 203 F.2d 510, 513 (C.A. 3):

> A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention.

respondent Massachusetts Board of Education (hereinafter "the State Board") quibbles with the next sentence of the petition which begins "[t]he long-term white teachers who carry the entire burden of accommodating to a sharply reduced school budget. . . ." The State Board contends that:

> Under the challenged order, which mandated that the current *percentage* of black teachers be retained, the substantial number of layoffs at issue clearly reached black teachers, albeit less senior black teachers, as well as white teachers. [State Bd. Opp. at 24.]

The facts are these: Over one thousand white permanent (*i.e.* tenured) teachers were laid off pursuant to the district court's order; no permanent black teachers were laid off. With regard to the effect of that order on provisional teachers—the teachers who work on the basis of a one-year contract—in the year following the order, half of the white provisional teachers were terminated (those without special skills), and a third of the black provisional teachers were terminated (those lacking a teaching certificate or other basic qualifications).

4. The State Board contends that the references in our petition to principles established in cases involving employment discrimination decided under Title VII of the Civil Rights Act of 1964 or under the Fourteenth Amendment are "misguided" because this is a school desegregation case "involv[ing] the vindication of the constitutional rights of black school children." State Bd. Opp. at 12. The State Board asserts that "[p]etitioners should more properly address the line of cases which emphasize the relationship between faculty-staff considerations and school desegregation." State Bd. Opp. at 12-13.

None of the decisions cited by the State Board (at p. 13 of its opposition), and indeed no school desegrega-

tion decision of this Court, has addressed the need for or propriety of a requirement that a school system hire or retain a particular proportion of black teachers in its overall workforce. Indeed, no decision of this Court has dealt with any question of hiring or retention based on race in the context of a desegregation order. The cases cited by the State Board deal with a different question: the power of the courts, in the context of fashioning a school desegregation remedy, to order the *reassignment* of teachers as between schools within a school system to eliminate racial imbalance in the assignment of already employed teachers.[4]

Thus, this Court has never addressed, much less resolved, the issues posed by this case. This Court has never determined whether and to what extent the principles applicable in employment discrimination cases generally may be applicable in the context of a school desegregation order. Indeed, this Court has never determined whether and to what extent there may be any resort to racial preferences in hiring or in making discharges in the public sector. That void in the constitutional law is itself a compelling ground for granting the petition here.

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[4] Where racial discrimination in teacher assignments has been part of an overall system of segregated schools, it has been necessary to reassign teachers as part of a general plan to eliminate so far as possible the racial identity of particular schools. See *Rogers v. Paul*, 382 U.S. 198, 200; *Bradley v. School Board of City of Richmond*, 382 U.S. 103, 105; *United States v. Montgomery County Board of Education*, 395 U.S. 225, 232, 236; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18, 19-20; see also *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 196; *Columbus Board of Education v. Penick*, 443 U.S. 449, 453, 455; *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535, 539.

CONCLUSION

For the reasons stated in the petition for a writ of certiorari and in this reply brief the petition should be granted.

Respectfully submitted,

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